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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

SAMUEL SALDANA,

Defendant and Appellant.

H033104

(Santa Clara County  
Super. Ct. No. CC325179)

Defendant Samuel Saldana was convicted after jury trial of two counts of carjacking (Pen. Code, § 215; counts 1 & 4),<sup>1</sup> and three counts of second degree robbery (§§ 211, 212.5, subd. (c); counts 2, 3 & 5). The jury also found true allegations that defendant was armed with a handgun (§ 12022, subd. (a)(1)) during the commission of all the offenses, and that he personally used a handgun (§ 12022.53, subd. (b)) during the commission of counts 1, 2, 4 and 5. Defendant admitted having served a prior prison term. (§ 667.5, subd. (b).) The trial court sentenced defendant to 26 years four months in state prison and ordered that he pay \$2,000 in attorney's fees. On November 13, 2007, this court reversed the judgment and remanded the matter for resentencing and a hearing

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<sup>1</sup> All unspecified statutory references are to the Penal Code.

on defendant's ability to pay attorney's fees. (*People v. Saldana* (Nov. 13, 2007, H027313) [nonpub. opn.] )

Following issuance of the remittitur, the parties filed supplemental resentencing memoranda and the probation department filed a supplemental probation report addressing defendant's custody credits. On June 11, 2008, the trial court sentenced defendant to 25 years four months in state prison but declined to order him to pay any attorney's fees.

On appeal, defendant contends, as he did in his first appeal, that the court's imposition of an upper term on the one count and consecutive terms on two others violated *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) and its progeny. We disagree and, therefore, will affirm the judgment.

### **BACKGROUND**

Defendant was charged by information with two counts of carjacking (§ 215; counts 1 & 4) and three counts of second degree robbery (§§ 211, 212.5, subd. (c); counts 2, 3 & 5). The information also alleged that defendant was armed with a handgun (§ 12022.53, subd. (b)) during the commission of all of the offenses, that he personally used a handgun (§ 12022.53, subd. (b)) during the commission of counts 1, 2, 4, and 5, and that he had previously served a prison term (§ 667.5, subd. (b)).

The evidence at trial showed that at different times and places on August 28, 2003, defendant approached the cars of three different women, and displayed a handgun. He ordered two of the women he approached out of their cars, told them to leave some of their belongings in their cars, and drove off in their cars with those belongings. He demanded money from the third woman he approached and he left after she gave some money to him. One of the stolen cars was found abandoned later that same day. Defendant had been seen by officers driving the second stolen car before he ran from it and was apprehended.

A jury found defendant guilty of all charges and found all arming allegations to be true, and defendant admitted the prison prior allegation. The court sentenced defendant to 26 years four months in state prison as follows: the aggravated term of nine years on count 1, with a consecutive 10-year term for the section 12022.53, subdivision (b) enhancement; a consecutive sentence of five years on count 4 (one-third of the total of the middle term of five years plus the 10-year section 12022.53, subdivision (b) enhancement); a consecutive term of one year four months on count 3 (one-third of the total of the middle term of three years plus the one-year section 12022, section (a)(1) enhancement); and a consecutive term of one year for the prison prior. Terms on all other counts and enhancements were ordered stayed pursuant to section 654. The court also ordered defendant to pay attorney's fees not to exceed \$2,000.

On appeal, defendant contended in part that the court's imposition of an upper term on the one count and consecutive terms on two others violated *Blakely, supra*, 542 U.S. 296, and that the order to pay attorney's fees was not supported by substantial evidence. On August 18, 2005, we struck the order to pay attorney's fees, ordered the abstract of judgment corrected to accurately reflect the trial court's sentence, and affirmed the judgment as so modified. Our Supreme Court denied review, but the United States Supreme Court granted defendant's petition for a writ of certiorari, vacated our opinion, and remanded the matter back to us for reconsideration in light of *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*). On May 31, 2007, after reconsideration of the *Blakely* issue following *Cunningham*, we reversed the judgment and remanded the matter for resentencing. On September 12, 2007, our Supreme Court transferred the matter to this court with directions to vacate our decision and reconsider the cause in light of *People v. Black* (2007) 41 Cal.4th 799 (*Black II*) and *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*). Upon reconsideration of the *Blakely* issue following *Black II* and *Sandoval*, in an unpublished opinion filed November 13, 2007, we

again reversed the judgment and remanded the matter for resentencing and a hearing on defendant's ability to pay attorney's fees. (*People v. Saldana, supra*, H027313.)

Following issuance of the remittitur, the People filed a memorandum requesting that the trial court again impose the aggravated term for count 1 and consecutive terms for each count and enhancement. As the judge who had presided over defendant's trial and sentenced him has retired, the judge assigned to the matter asked both parties to file additional points and authorities. Defendant filed a response to the People's resentencing memorandum, requesting that the court impose the middle term on count 1, thereby imposing a sentence of 22 years four months. The People filed a supplemental memorandum, defendant filed a response to the supplemental memorandum, and the probation department filed a supplemental memorandum updating defendant's custody credits.

On June 11, 2008, the court stated that it had reviewed the court file and read and considered the original sentencing memoranda, the original probation officer's report, this court's opinion on appeal, the sentencing memoranda after remand, the supplemental probation report, and documents from the California Youth Authority regarding defendant's juvenile court history. Defendant argued that, although there was no mention of it in his supplemental sentencing memorandum, he was objecting to imposition of consecutive terms. Defendant further argued that, if the court were to use defendant's prison prior as a factor in aggravation, it could not separately impose a one-year term for the prison prior, and the court should not use defendant's juvenile court history as a factor in aggravation because those offenses were too remote, having occurred 15 or 16 years earlier. The prosecutor argued that the imposition of consecutive sentences was found proper in *Black II*. The prosecutor further argued that the court could use defendant's entire criminal history as a factor in aggravation to impose the upper term on count 1 and still impose a one-year term for the specific prison prior.

The court found as to count 1 that “the crime did involve great violence, great bodily harm and so on” (see Cal. Rules of Court, rule 4.421(a)(1));<sup>2</sup> “there was planning and sophistication” (see rule 4.421(a)(8)); “the crime did involve actual or attempted taking or damage of great monetary value” (see rule 4.421(a)(9)); defendant “engage[ed] in violent conduct” (see rule 4.421(b)(1)); “defendant’s prior performance on probation or parole was unsatisfactory” (see rule 4.421(b)(5)); and “[h]is prior convictions and sustained petitions are numerous, and they do indicate a pattern of violence and weapons possession. The defendant has previous felony convictions for possession of methamphetamine and misdemeanor weapons charges as a juvenile. He has sustained petitions for threatening school personnel, possession of . . . stolen property, auto theft, and robbery with the personal use of a firearm, and numerous violations of parole and probation. His juvenile history alone would have suggested the imposition of an aggravated sentence.” (See rule 4.421(b)(2).) The court found no mitigating factors. Accordingly, the court imposed a prison term of 25 years four months. The term consists of the aggravated term of nine years on count 1, and the 10-year term for the section 12022.53, subdivision (b) enhancement; and consecutive terms of five years (one-third the midterm sentence plus the 10-year enhancement) for count 4, and one year, four months (one-third the midterm of three years plus the one-year enhancement) on count 3. The court stated that it imposed consecutive sentences because these counts involved “different crimes involving different victims, occurring at different times with different motivations.” (See rules 4.425(a)(1) & (a)(3).) The court stayed the terms for the other counts and enhancements under section 654, struck the prison prior, awarded a total of 1,802 days custody credits, and declined to order defendant to pay any attorney’s fees.

Defendant filed a timely notice of appeal from the judgment.

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<sup>2</sup> All further rule references are to the California Rules of Court.

## DISCUSSION

In his opening brief, defendant contends that “the court’s imposition of upper and consecutive determinate terms here based on these court findings by a preponderance violated *Cunningham*’s . . . and *Blakely*’s . . . requirement that facts increasing the statutory minimum punishment must be admitted by the defendant or found true by the jury beyond a reasonable doubt.” “[T]he complete failure to submit *any* of the relevant aggravators relied on by the court here to a jury appears to require reversal per se. . . . In any event, reversal is required here under any prejudice standard, especially the federal standard. . . . This is particularly so where the court relied on so many suspect factors as against a single (less serious) prison term conviction; and particularly where the court placed such great reliance on more serious juvenile violations in which the defendant received no jury trial contrary to *United States v. Tighe* (9th Cir. 2001) 266 F.3d 1187 [*Tighe*] and like cases. Further, as regards consecutive terms the court did not cite prior convictions, only debatable offense-related findings like ‘different motivations’ underlying closely related offenses.” “[D]efense counsel’s objections were ample and further objections were excused based on futility under state law as well as unsettled law or changes in law. Nonetheless, if defense counsel were required to lodge separate objection[s] to consideration of the key serious juvenile violations . . . the failure to do so deprived [defendant] of the effective assistance of counsel without conceivable tactical justification, warranting relief on direct appeal.”

The Attorney General contends that the court did not err in imposing the upper and consecutive terms. “[Defendant’s] criminal history clearly was an aggravating circumstance that made him eligible for the upper term sentence. . . . [His] complaint that the trial court placed too much reliance on his juvenile adjudications as part of his criminal record has no merit.” “[His] claim that the trial court erred in imposing consecutive terms lacks merit because this Court is bound by the decision in *Black II* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455) and the trial court’s

imposition of consecutive terms comports with the holding in that case. [Defendant's] claim is also foreclosed by the recent decision in *Oregon v. Ice* (2009) [555] U.S. \_\_\_, 129 S.Ct. 711, in which the Court held that the Sixth Amendment does not require juries to make findings of fact regarding the imposition of consecutive rather than concurrent sentences, and that states may allow judges to make those findings of fact. (*Id.* at pp. 716-720.)” The Attorney General further contends that defendant “has failed to establish prejudice” due to any alleged ineffective assistance of counsel.

In his reply brief, defendant “acknowledges *Oregon v. Ice*[, *supra*, 129 S.Ct. 711] appears to foreclose his argument [that] the imposition of consecutive terms was unconstitutional. Nonetheless, [defendant] maintains this claim for exhaustion purposes due to the closeness of the *Ice* decision, flux in this area of law, differences in California law versus Oregon law, and constitutional questions . . . regarding the constitutionality of retroactive applications of the relevant case law and statutes.”

In *Black II*, our Supreme Court re-examined the propriety of the defendant's upper term sentence in light of *Cunningham*. The court concluded that “so long as a defendant is *eligible* for the upper term by virtue of facts that have been established consistently with Sixth Amendment principles, the federal Constitution permits the trial court to rely upon any number of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found to be true by a jury.” (*Black II, supra*, 41 Cal.4th at p. 813.) Therefore, it held “that imposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions.” (*Id.* at p. 816.) Because the trial court had based the defendant's upper term sentence upon a factor (force used to commit a sex crime) that was the basis for the

jury's prior true finding on a special allegation, the *Black II* court held that the upper term sentence was not unconstitutional. (*Id.* at pp. 816-817.)

Additionally, the *Black II* court noted that the defendant was eligible for an upper term sentence due to a second aggravating circumstance, his criminal history. (*Black II*, *supra*, 41 Cal.4th at p. 818.) The trial court had indicated that it considered "the other aggravating circumstances set out in the district attorney's sentencing brief." (*Ibid.*) That brief had noted the aggravating factor in rule 4.421(b)(2) that "defendant's prior convictions . . . are numerous or of increasing seriousness," and the probation report had listed three prior misdemeanor and two prior felony convictions. (*Black II*, *supra*, at p. 818.) The *Black II* court concluded that the trial court's imposition of the upper term sentence based in part on the defendant's history of prior convictions was not unconstitutional. "The determinations whether a defendant has suffered prior convictions, and whether those convictions are 'numerous or of increasing seriousness' [citation], require consideration of only the number, dates, and offenses of the prior convictions alleged. The relative seriousness of these alleged convictions may be determined simply by reference to the range of punishment provided by statute for each offense. This type of determination is 'quite different from the resolution of the issues submitted to a jury, and is one more typically and appropriately undertaken by a court.' [Citation.]" (*Id.* at pp. 819-820, fn. omitted; see also *People v. Towne* (2008) 44 Cal.4th 63, 79 ["the federal constitutional right to a jury trial and proof beyond a reasonable doubt on aggravating circumstances does not extend to the circumstance that a defendant was on probation or parole at the time of the offense or has served a prior prison term"].)

*Black II* disposes of defendant's contentions regarding the trial court's imposition of the upper term sentence. One of the factors relied upon by the court in imposing the upper term sentence of nine years for count 1 was that defendant's "prior convictions and sustained petitions are numerous." The record supports the trial court's findings. The record shows, and defendant does not dispute, that as an adult, defendant had previously



been convicted of possession of methamphetamine (a felony) and possession of a concealed firearm in a vehicle (a misdemeanor). As a juvenile, he had sustained petitions for threatening to injure an educational employee (a misdemeanor), possessing stolen property (a misdemeanor), auto theft (a felony) and robbery with personal use of a firearm (a felony). The numerous prior convictions finding was not one for which defendant was entitled to a trial by jury and a finding of proof beyond a reasonable doubt. (*Black II, supra*, 41 Cal.4th at pp. 819-820.)

We also conclude that neither due process nor the right to a jury trial was infringed by the trial court's consideration of defendant's juvenile adjudications, notwithstanding that a juvenile court judge, rather than a jury, adjudicated the juvenile delinquency petitions.<sup>3</sup> Due process dictates that a juvenile "has the right to notice of the charges against him or her, the right to counsel, the privilege against self-incrimination, the right to confrontation and cross-examination, the protection against double jeopardy, and the allegation must be proved beyond a reasonable doubt." (*People v. Superior Court (Andrades)* (2003) 113 Cal.App.4th 817, 834.) Accordingly, " 'juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended' " in this context. (*Id.* at p. 832.)

Nor was there any infringement of the constitutional right to a jury trial. Neither the federal nor the California constitutions affords a juvenile the right to have a delinquency petition adjudicated by a jury. (*McKeiver v. Pennsylvania* (1971) 403 U.S. 528, 545 (plur. opn. of Blackmun, J.); see also *id.* at p. 551 (con. opn. of White, J.) and *id.* at p. 557 (conc. opn. of Harlan, J.); *People v. Superior Court (Carl W.)* (1975) 15 Cal.3d 271, 274.) As this court stated in *Andrades, supra*, 113 Cal.App.4th at page

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<sup>3</sup> The question whether a juvenile adjudication may constitute a strike prior is currently pending before our Supreme Court. (*People v. Nguyen* (2007) 152 Cal.App.4th 1205, review granted Oct. 10, 2007, S154847.)

833, “ “ “ when a juvenile receives all the process constitutionally due at the juvenile stage, there is no constitutional problem . . . in using that adjudication to support a later sentencing enhancement.” [Citation.]’ [Citations.]”

The trial court could properly find defendant eligible for the upper term sentence on count 1 based on his serious criminal history. As one aggravating circumstance that rendered defendant eligible for the upper term sentence on count 1 was established in accordance with *Blakely* and its progeny, any additional factfinding engaged in by the trial court in selecting the upper term did not violate defendant’s right to a jury trial. (*Black II, supra*, 41 Cal.4th at p. 812.)

Defendant has called our attention to the decision in *Tighe, supra*, 266 F.3d 1187, 1994, where the Ninth Circuit Court of Appeals held that a prior juvenile adjudication cannot be used to increase a federal sentence because the issue was not presented to a jury. (But see *Boyd v. Newland* (9th Cir. 2004) 393 F.3d 1008, 1016-1017.) This court is not required to follow the precedents of the Ninth Circuit Court of Appeals. A “holding of the federal court, although entitled to respect and careful consideration, would not be binding or conclusive on the courts of this state.” (*Bank of Italy etc. Assn. v. Bentley* (1933) 217 Cal. 644, 653.) Hence, to the extent that *Tighe* provides reasoning contrary to that of *Andrades*, we decline to rely on it for guidance. (See *Andrades, supra*, 113 Cal.App.4th at pp. 831-834; see also *People v. Garcia* (1999) 21 Cal.4th 1; *People v. Lee* (2003) 111 Cal.App.4th 1310, 1312-1316; *People v. Bowden* (2002) 102 Cal.App.4th 387, 393-394; *People v. Smith* (2003) 110 Cal.App.4th 1072, 1077-1078.) No constitutional violation due to the imposition of an upper term sentence for count 1 has been shown.<sup>4</sup>

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<sup>4</sup> As we have found no constitutional violation by the trial court’s reliance on defendant’s juvenile adjudications to enhance defendant’s sentence, we need not address defendant’s contention that counsel may have rendered ineffective assistance by failing to object to the sentence on those grounds.

In addition, as the Attorney General notes, our Supreme Court has held that the Sixth Amendment right to a jury trial does not apply to a trial court's findings in connection with the imposition of a consecutive sentence. (*Black II, supra*, 41 Cal.4th at pp. 821-823.) And, as defendant concedes in his reply brief, the United States Supreme Court has recently addressed the issue and has held that the Sixth Amendment does not apply to sentencing schemes which require judges, rather than juries, to find certain facts before imposing consecutive sentences. (*Oregon v. Ice, supra*, 129 S.Ct. at pp. 714-715.) Based on these authorities, we reject defendant's contention that the trial court violated his right to a jury trial when it imposed consecutive sentences based on facts not found by a jury.

#### **DISPOSITION**

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

I CONCUR:

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MIHARA, J.

McAdams, J.

I respectfully dissent.

For the reasons stated in our majority opinion in *People v. Nguyen*, review granted October 10, 2007 (S154847), I find the use of defendant's juvenile prior adjudications under the Three Strikes Law unconstitutional under *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 and I would reverse. See also the dissenting opinion of Justice Zelon in *People v. Del Rio* (2008) 165 Cal.App.4th 439, 441-444.

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McAdams, J.